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Supreme Court, U.S.
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No. 95-452

In The

Supreme Court of the United States

October Term, 1995

JANICE C. CAMPBELL,

Petitioner,

vs.

JOSEPH E. CAMPBELL, *et al.*,

Respondents.

On Petition for Writ of Certiorari to the Missouri Court of Appeals, Western District

BRIEF IN OPPOSITION FOR RESPONDENT REBBECCA LAKE OVERMAN, ADMINISTRATOR AD LITEM

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QUESTIONS PRESENTED

1. Is § 473.277 of the Missouri Revised Statutes unconstitutional?

2. Did the trial court act within its statutory powers in dismissing a jury and accepting the settlement proffered by the administrator ad litem for the estate?

3. Did the trial court violate the petitioner's rights to due process by refusing to hear expert testimony regarding the viability of certain Ford Motor Company stock?

LIST OF PARTIES

The parties to the proceedings in the Missouri Court of Appeals, Western District, were the petitioner Janice C. Campbell, the respondents Joseph E. Campbell and Richard Campbell, and the Administrator ad Litem, Rebbecca Lake Overman.

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No. 95-452

In The

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October Term, 1995

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Petitioner,

vs.

JOSEPH E. CAMPBELL, *et al.*

Respondents.

On Petition for Writ of Certiorari to the Missouri Court of Appeals, Western District

RESPONDENT'S BRIEF IN OPPOSITION FOR REBBECCA LAKE OVERMAN, ADMINISTRATOR AD LITEM

Respondent, Rebbecca Lake Overman, Administrator ad Litem for the Estate of Joseph F. Campbell, respectfully requests that this Court deny the Petition for Writ of Certiorari seeking review of the opinion of the Missouri Court of Appeals, Western District, in this case.

Respondent, Rebbecca Lake Overman, Administrator ad Litem for the Estate of Joseph F. Campbell respectfully submits this brief in opposition to the Petition for a Writ of Certiorari of Janice C. Campbell, filed with this Court on September 18, 1995.

STATUTES INVOLVED

This case applies Mo. Rev. Stat. § 473.277 (1994), which provides:

> When it appears for the best interest of the estate, the executor or administrator, on order of the court, may affect a fair and reasonable compromise with any debtor or other obligor, or extend, renew or in any manner modify the terms of any obligation owing to the estate. If the executor or administrator holds a mortgage, pledge or other lien upon property of another person, he may accept, in lieu of foreclosure, a conveyance or transfer of the encumbered assets from the owner thereof in satisfaction of the indebtedness secured by the lien, if it appears for the best interest of the estate and if the court so orders. In the absence of prior authorization or subsequent approval of the court, no compromise binds the estate.

This case also applies Mo. Rev. Stat. § 473.460 (1980), which provides:

> 1. Real or personal property belonging to an estate may be sold, mortgaged, leased, or exchanged under court order for any of the following purposes:

(1) For the p ment of claims allowable against the estate;

(2) For the payment of any allowance made to the surviving spouse and minor children of a decedent;

(3) For the payment of any legacy given by the will of the decedent;

(4) For the payment of expenses of administration including court costs;

(5) For the payment of any gift, estate, inheritance or transfer taxes assessed upon the transfer of the estate or due from the decedent or his estate;

(6) For any other purpose in the best interest of the estate; or if it would be burdensome to the heirs or devisees to distribute the personal property or the real estate in kind.

2. Real and personal property may be sold or mortgaged under order of the court when necessary for the purpose of making distribution of the estate or any part thereof.

3. Personal property of the estate shall be exhausted before real estate is ordered sold for the payment of the obligations of the estate unless the court otherwise orders.

This case also applies Article V, Section 3 of the Constitution of Missouri, 1982, which provides:

> The supreme court shall have exclusive appellate jurisdiction in all cases involving the validity of a treaty or statute of the United States, or of a statute or provision of the constitution of this state, the construction of the revenue laws of this state, the title to any state office and in all cases where the punishment imposed is death. The court of appeals shall have general appellate jurisdiction in all cases except those within the exclusive jurisdiction of the supreme court.

OPINION BELOW

The opinion of the Missouri Court of Appeals, Western District is reported at 898 S.W.2d 630 (Mo. App. 1995) and is included in the Appendix to the Petition at pages A98 through A108.

STATEMENT OF JURISDICTION

On March 14, 1995, the Missouri Court of Appeals, Western District, rendered its opinion in this cause. Thereafter, on May 2, 1995, the Missouri Court of Appeals, Western District, denied petitioner's Motion for Rehearing and/or Transfer to Supreme Court. The Missouri Supreme Court denied petitioner's Application to Transfer on June 20, 1995. While the petitioner asserts jurisdiction under 28 U.S.C. § 1257(a), the Court is without jurisdiction to hear the questions presented in the Petition because they were not properly raised or presented in the Missouri state courts below. United States Supreme Court Rule 14.1(h).

COUNTERSTATEMENT OF THE CASE

The factual background of this case is correctly set forth in the opinion by the Missouri Court of Appeals. A summary and some historical notes follow.

The petitioner, Janice C. Campbell, and respondents Joseph E. Campbell and Richard Campbell are the surviving children of the decedent, Joseph F. Campbell who died testate on October 21, 1987. Resp. App. A2. The petitioner commenced an action to Discover Assets against her brothers (who also served as co-personal representatives for the estate) on March 29, 1993. Resp. App. A3. She made a Demand for Jury Trial on September 14, 1993. Pet. App. A10. Thereafter, the court appointed Rebbecca Lake Overman to serve as administrator ad litem for the estate. A Second Amended Petition to Discover Assets was filed on January 6, 1994. Resp. App. A1. That action alleged that, during a period of incapacity of the decedent, the brothers had sold or transferred certain of the decedent's assets to one or the other of them. Resp. App. A1-A6.

On January 24, 1994, petitioner's action came on for trial. Pet. App. A15 The record on appeal reflects that a jury was empaneled. Pet. App. A15. The record on appeal does not contain any of the proceedings involving opening statements, presentation of evidence by any of the parties, proceedings in chambers, or the like. At the petitioner's election, those items from the transcript were omitted. Pet. App. A15. The balance of the transcript deals with the dismissal of the jury and a settlement conference which was held on the record in open court. Pet. App. A15-A38. None of the parties made any objection to the dismissal of the jury or subsequent settlement proceedings. Pet. App. A15-A38.

The "settlement" recommended and presented by the

administrator ad litem sought monetary recovery and applied certain setoffs against each party's distributive share of the estate. The trial court made a finding that "[t]he settlement proposed by the Administrator ad Litem appears to fairly affect the rights of all parties, is a reasonable compromise of the controversy, and is in the best interest of the estate." Pet. App. A15-A38.

On March 17, 1994, in a separate action, the administrator ad litem petitioned the court for an order to sell 980 shares of Ford Motor Company stock held in the name of the decedent. Pet. App. A66-A82. The administrator ad litem testified that there were, at that time, only two assets within her control which were not the subject of litigation, namely two parcels of real property and 980 shares of Ford Motor Company stock. Pet. App. A69. The administrator testified that there were expenses of administration, including court costs, attorneys fees, utility expenses for the real property and other anticipated costs which would require the liquidation of the stock. Pet. App. A69-A74. The petitioner sought to admit the testimony of a stock analyst that the Ford stock represented a viable investment and that it would produce income if left undisturbed. Pet. App. A80. The trial court refused to allow the testimony and issued an order for the sale of the Ford Motor Company stock. Pet. App. A82-A83. The Missouri Court of Appeals, after consolidating the appeals, affirmed the trial court in all respects. The Missouri Supreme Court, in its discretion, denied transfer for review. Pet. App. A123-A124.

SUMMARY OF ARGUMENT

This Court should not grant Campbell's Petition for Writ of Certiorari with respect to questions one and two which claim that the trial judge denied her right to a jury trial by terminating the proceedings and accepting a settlement proposed by the administrator ad litem for the following reasons: (1) the

petitioner failed to preserve any constitutional issue for review; (2) the determination of the Missouri Court of Appeals upholding the trial court's actions do not raise a federal issue or otherwise present an issue of significance for this Court's review; and (3) the trial court's action did not violate her Fifth and Fourteenth Amendment right to due process and the opinion of the Missouri Court of Appeals, Western District, is correct.

The petitioner's primary claim, contained in questions 1 and 2 represents a constitutional attack of Mo. Rev. Stat. § 473.277 (1994) under the Fourteenth and Fifth Amendments of the United States Constitution. That statute allows the administrator of a decedent's estate to settle or compromise a claim against a debtor to the estate where it appears that same is in the best interest of the estate. Petitioner claims that this statute and the trial court's reliance on it in terminating a jury trial to recover assets for the estate and accept a settlement recommended by the administrator ad litem constitutes a violation of her right to trial by jury and therefor, to due process of law.

Petitioner's claim is specious in that it assumes she has an *absolute* right to have all issues ultimately determined by a jury regardless of the consequence to the estate and other interested parties such as creditors, devisees and beneficiaries. At issue is whether an ultimate beneficiary to an estate has the right to oppose a reasonable compromise of disputed issues of fact and law if such opposition may likely result in detriment to the other creditors, devisees and beneficiaries.

In her third question for review, the petitioner claims that she was denied due process of law in an unrelated proceeding involving the administrator ad litem's motion to sell certain personal property belonging to the Estate of Joseph F. Campbell. Petitioner's claim raises no federal issue and there is no reason for this Court to take up the petitioner's request. She is merely a

disgruntled litigant who was dissatisfied with an evidentiary ruling made by the trial court with respect to certain expert testimony not directly related to the legal issues at hand. It is axiomatic that the trial court has full discretion to rule on questions regarding the admission of evidence and reversal of such decisions is made only upon the showing that the trial court has abused its discretion. *M__D__ v. C__D__*, 691 S.W. 2d 406, 408 (Mo. App. 1985).

REASONS FOR DENYING THE WRIT

I.

THE WRIT SHOULD BE DENIED BECAUSE THE PETITIONER PRESERVED NO CLAIM FOR REVIEW, BECAUSE THIS CASE DOES NOT PRESENT SIGNIFICANT FEDERAL ISSUES OR OTHER IMPORTANT REASONS FOR GRANTING THE WRIT AND BECAUSE THE MISSOURI COURT OF APPEALS CORRECTLY DECIDED THE CASE.

Petitioner's first two questions for review address the constitutionality of the trial court's action, and the statute on which the trial court relied, in discharging the jury and accepting a "settlement" proposed by the administrator ad litem in an action brought by the petitioner to discover assets in a decedent's estate.

A. Petitioner Has Preserved Nothing For Review.

Petitioner was present in court and represented by counsel when the trial judge announced to the jury that he was dismissing them from further service on the case because the administrator ad litem had arrived at a settlement which was fair to all parties and the estate. Pet. App. A15-A18. Petitioner made no objection to the dismissal of the jury. Thereafter, the trial judge heard the

formal presentation of the settlement from the administrator ad litem. The proposal incorporated a substantial number of assets which were listed in detail in open court. The petitioner made no objection to either the manner of the presentation or its content.[1] Pet. App. A20-A38. Under Missouri procedure, failure to timely object leaves nothing for appellate review. *Powell v. Hickman*, 793 S.W. 2d 885, 893 (Mo. App. 1990); *Sullivan v. Union Electric Light & Power*, 56 S.W. 2d 97, 104 (Mo. 1932).

Furthermore, the petitioner's constitutional challenges to Mo. Rev. Stat. § 473.277 (1994) were not, and could not have been presented to or decided by the Missouri Court of Appeals because, under Missouri procedure, the Supreme Court of Missouri has exclusive jurisdiction over challenges to the constitutionality of Missouri statutes. Missouri Constitution, Article V, Section 3; Resp. Br. at 2. By permitting this appeal to proceed in the Missouri Court of Appeals rather than the Supreme Court of Missouri, the petitioner waived any constitutional challenges to the statute. *McLeran v. St. Luke's Hosp. of Kansas City*, 687 S.W. 2d 892, 893 (Mo. banc 1985); *State ex rel. Union Electric Co. v. Public Service Comm'n*, 687 S.W. 2d 162, 165 (Mo. banc 1985).

The Missouri Court of Appeals refused to rule on any constitutional challenge raised by the petitioner. In a footnote, the Court of Appeals noted that the petitioner's allegation that she had been denied a jury trial was unsupported by the record because the petitioner had failed to provide any portions of the transcript which might have shed light on her claim. Pet. App.

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1. Petitioner now complains that the settlement proposal should have been in written form as required under Mo. Rev. Stat. § 473.085 (1994). As the Missouri Court of Appeals, Western District, aptly discussed in its opinion, Mo. Rev. Stat. § 473.085 (1994). applies only to settlements which are the result of the agreement of all parties and where the parties seek approval of the settlement from the Probate Court.

A102. As a result of the deficient record, the Missouri Court of Appeals refused to consider the petitioner's constitutional challenge. Pet. App. A102.

All of the petitioner's claims must be rejected since they were not specifically preserved at the appellate level. The petitioner's allegations in her Motion for New Trial discuss only the denial of her right to a jury trial in general. Pet. App. A84-A89. Not until the petitioner's Motion to Transfer this cause to the Supreme Court of Missouri, following affirmance by the Missouri Court of Appeals, does she specifically raise the question of whether Mo. Rev. Stat. § 473.277 (1994) constitutes a violation of due process under the Fourteenth and Fifth Amendments of the United States Constitution. Pet. App. A116-A122. This Court has long held that a general complaint of denial of a federal right is not sufficient to preserve anything for certiorari review. *Banker's Life & Casualty Co. v. Crenshaw*, 486 U.S. 71, 76-77 (1988); *Taylor v. Illinois*, 484 U.S. 400, 407 (1988)[2]. The petitioner's generic claim that she was denied due process of law because a jury trial was terminated without her consent is not so specific as to raise a federal question for the state appellate court's review. *See Hartford Life Ins. Co v. Johnson*, 249 U.S. 722 (1918). *See also, Sayward v. Denny*, 158 U.S. 941 (1894).

B. The Issues Raised Do Not Present a Federal Question.

Petitioner's case derives from an action in the Circuit Court of Jackson County, Missouri and seeks relief under Mo. Rev. Stat. § 473.340 (1994)which allows any interested person to bring an action to discover assets which are or should be claimed by an estate. Dissatisfied with the trial court's decision to accept a

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2. A lengthy analysis of this issue may be found in footnote 9 of the *Taylor* opinion. 484 U.S. at 406, fn. 9.

compromise settlement recommended by the administrator of the estate, she appealed to the Missouri Court of Appeals, Western District. Further dissatisfied with the opinion rendered by the Missouri Court of Appeals, the petitioner sought transfer to the Missouri Supreme Court. On June 20, 1995, the Missouri Supreme Court denied transfer.

Petitioner's complaint that Mo. Rev. Stat. § 473.277 (1994) is unconstitutional is not appropriate for this Court's review. The Missouri Supreme Court declined to render any opinion on the constitutionality of Mo. Rev. Stat. § 473.277 (1994). By denying transfer, it relies on the Missouri Appellate Court's analysis of the statute as it was applied to the petitioner. As this Court has previously declared "questions of state law required to be decided (in the United States Supreme Court) should first be considered and decided by the state or federal court from which the case is brought. . . . (and) (t)he decision of the highest court of a state on matters of state law are in general conclusive upon (the United States Supreme Court). . . . *Huddleston v. Dwyer*, 322 U.S. 232, 237 (1944). Not every complaint regarding the action of the state court is suitable for certiorari review. On certiorari review of a state's highest court, there are strong reasons for the Supreme Court to adhere scrupulously to the customary limitations on its discretion where difficult issues of great public importance are involved. *Illinois v. Gates*, 462 U.S. 213, 224 (1983). Certiorari jurisdiction should be used sparingly and then, only in cases of particular gravity. *Hamilton-Brown Shoe Co. v. Wolf Brothers & Co.*, 240 U.S. 251, 258 (1916).

The petitioner's arguments fall far short of that necessary for this Court to take up jurisdiction. The Missouri Court of Appeals has on two occasions given a clear and precise analysis of the purpose and application of Mo. Rev. Stat. § 473.277 (1994) as it relates to the administrator's right to settle disputed claims on behalf of an estate. (A more complete discussion of the Missouri

Court of Appeals analysis of Mo. Rev. Stat. § 473.277 (1994) appears below. *See Smith v. Snodgrass*, 747 S.W. 2d 743 (Mo. App. 1988); *See also Campbell v. Campbell*, 898 S.W. 2d 630 (Mo. App. 1995) *infra* at 13-16.) The petitioner makes no attempt to show this Court why that analysis fails to meet the due process requirements of the Fifth and Fourteenth Amendments of the United States Constitution.

Moreover, the questions presented for review have no impact on the ultimate issues in the case. The petitioner did not complain at *any* level of the trial or appellate process that the settlement was unfair, unreasonable or unsupported by the evidence. This Court is not in the business of considering every theoretical hypotheses for some nebulous cause. This Court has made it clear that it considers only matters of extreme importance where injustice is manifest and the ultimate betterment of the American system of jurisprudence is at stake. *Hamilton- Brown Shoe Co. v. Wolf Brothers & Co., supra* at 258; *Illinois v. Gates, supra* at 224. This is not such a case.

C. The Opinion of the Missouri Court of Appeals Was Correct in This Case.

Petitioner claims that she was deprived of property without due process of law under the Fourteenth Amendment. She claims, in essence, that as the aggrieved petitioner, she had the *absolute* right to control the litigation, including the right to insist on a jury trial. In spite of this bold assertion, the petitioner admits in her brief that due process does not always mandate that the issues be tried by a jury. Pet. Br. pp.8-9. Clearly, in matters of equity, summary judgment, administration of estates, and the like, the plaintiff is not entitled to a trial by jury. *See State ex rel. Rope v. Borron*, 762 S.W. 2d 427 (Mo. App. 1988); *see Ross v. Bernhard*, 396 U.S. 531, 538-539 (1970).

In support of her claim, the petitioner relies on the general proposition that a cause of action is "property" entitled to protection against deprivation without due process of law. Her complaint hinges on her assumption that the action brought to discover assets was *her* property right. In fact, the petitioner was merely a conduit for the initiation of the action. The estate was entitled to the proceeds of the action and therefor, the "property right" lies with the administrator for the estate.

In Missouri, the discovery of assets statute, Mo. Rev. Stat. § 473.340 (1994), allows the initiation of an action by virtually anyone who is not an absolute stranger to the asset in question or the estate. *See* Pet. App. A7. The petitioner in that action may have no right ultimately to benefit from the retrieval of the asset into the estate. His interest does not improve or increase by the mere initiation of the action. Mo. Rev. Stat. § 473.340 (1994) was designed to afford a summary method of discovering assets and expedite the administration of estates in the collection of assets, and to permit recovery of property or the proceeds thereof to the estate. *Caldwell v. First Nat. Bank of Wellston*, 283 S.W. 2d 921, 924 (Mo. App. 1955); *Davis v. Johnson*, 58 S.W.2d 746, 748 (Mo. 1933). Thus the right to possession of the assets "discovered" from the action is vested in the administrator for the estate.

Mo. Rev. Stat. § 473.277 (1994) creates the framework by which an administrator may seek the approval of the probate court of a settlement in a disputed claim or cause brought by or benefiting the estate. In *Smith v. Snodgrass*, 747 S.W. 2d 743 (Mo. App. 1988), the Missouri Court of Appeals discussed at length the purpose of Mo. Rev. Stat. § 473.277 (1994) and the relative roles of each party. That opinion sets forth the balancing of rights between the expectancy interest of the beneficiaries of the estate and the administrator's duty to marshall assets in a way which is reasonable in light of all factors and all parties. *Id.* at 745. The expectancy rights of the beneficiaries are protected

when they are given notice and an opportunity to be heard when an administrator seeks approval of a compromise.

This Court has never considered the constitutionality of Mo. Rev. Stat. § 473.277 (1994) or any similar probate statute from another state. This Court is not left without guidance, however. A "discovery of assets" action in a probate matter is very similar to a "derivative" action brought by a shareholder to enforce the rights of a corporation with respect to a broad range of misconduct, misappropriation or other legal claim.

The fundamental nature of a derivative action is to give the shareholder, who serves as the "nominal plaintiff", the right to hail the wrongdoer and the corporation into court to enforce the rights of the corporation against the wrongdoer. *See Daily Income Fund, Inc. v. Fox*, 464 U.S. 523 (1984). The corporation is the real party in interest, is entitled to the proceeds of the action and is bound by the result. *Ross v. Bernhard*, 396 U.S. 531, 538 (1970). In *Ross v. Bernhard, supra*, this Court discussed the relative rights of the parties in a derivative action. This Court considered the *corporation's* right to a jury trial on issues of law as protected by the Seventh Amendment to the United States Constitution, since it was the real party in interest. *Id.* at 534-535.

On the question of who has the right to settle or dismiss a shareholder's derivative action, this Court has specifically found that a state law permitting a disinterested committee of directors to dismiss a derivative action did not constitute a violation of the nominal plaintiff's rights. *Burks v. Lasker*, 441 U.S. 471, 478-479 (1979). In reaching that conclusion, this Court stated that the standard for reviewing state statutes was as follows:

> Although "[a] state statute cannot be considered 'inconsistent' with federal law merely because the statute causes the plaintiff

> to lose the litigation," . . . federal courts must be ever vigilant to insure that application of state law poses "no significant threat to any identifiable federal policy or interest. . . ."

Id. at 479 (citations omitted).

As for the New York statute permitting settlement or dismissal by the disinterested committee of directors, this Court found that such action was not contrary to federal policy or interest and that "[t]here may well be situations in which the independent directors could reasonably believe that the best interests of the shareholders call for a decision not to sue—as, for example where the costs of litigation to the corporation outweigh any potential recovery." *Id.* at 485. Clearly, this Court has upheld state law which allows the representatives of a corporation to terminate an action where, in their best business judgment, such an action is not in the best interest of the shareholders.

The instant case presents a precisely analogous set of issues, actions and parties. The petitioner was the nominal plaintiff who, under a broadly defined state statute, brought an action to enforce the rights of the estate against perceived wrongdoers. The administrator ad litem, representing the estate, was charged with the fiduciary duty to use her best judgment in determining whether the continuation of the action was in the best interest of the estate.

The Missouri courts applied this same analysis in considering the application of Mo. Rev. Stat. § 473.277 (1994) (settlement statute) to Mo. Rev. Stat. § 473.340 (1994) (action to discover assets). By giving the administrator the right to compromise a claim, the real party in interest maintains control of the action and ultimately, serves the best interest of the estate. Compromise is favored in the law, *Estate of Basler v. Delassus*,

supra at 796, and it would be unreasonable to require an administrator to "oppose a claim" to the "last ditch" since under such a scenario "(t)he estate might achieve a total victory or might suffer total defeat." *Estate of Basler v. Delassus*, 690 S.W. 2d 791, 796 (Mo. banc 1985); *see Estate of Veselich v. Northwestern Nat. Cas. Co.*, 760 S.W. 2d 564 (Mo. App. 1988).

The Missouri courts have interpreted the intent of Mo. Rev. Stat. § 473.277 (1994) as "provid(ing) a mechanism for expeditious compromise of claims held by an estate." *Smith v. Snodgrass*, *supra* at 745. As the Missouri Court of Appeals aptly pointed out in its opinion, "(t)he statute does not impose a time limit on the trial court's acceptance of a compromise from the administrator." Pet. App. A103. At such time as the administrator ad litem believed that it was no longer in the best interest of the estate to continue the trial, she had the *duty* to seek approval of a settlement from the trial court. Indeed, the purpose of the Missouri Probate Code, as it relates to the powers of the administrator, is to charge the representative of the estate with the fiduciary duty to make decisions which relate to the assets and obligations of the estate and to require him to act in the best interests of *all* persons interested in the estate. *Estate of Veselich v. Northwestern Nat. Cas. Co.*, *supra* at 569; *see Kentucky Cent. Life Ins. Co. v. Vollenweider*, 844 S.W. 2d 460 (Mo. App. 1992). Any other rule of law would result in anarchy wherein an unreasonable creditor or beneficiary could hold the estate hostage by refusing to compromise a claim or action at the expense of all others with an interest in the outcome. *See Estate of Basler v. Delassus, supra* at 796-797.

The petitioner was merely an ultimate beneficiary, not unlike a corporate shareholder. As such, she had no right to prohibit the administrator ad litem from taking action which was in the best interest of the estate. Following a hearing on the settlement proposal, the trial court agreed that the best interest of the estate

was served by accepting the administrator's settlement proposal and no one, not even the petitioner, objected to the proposal on the merits. The Missouri Court of Appeals, Western District, specifically affirmed the trial court's ruling that the settlement was a reasonable compromise of the controversy and was in the best interest of the estate. Pet. App. A101.

II.

THE WRIT SHOULD BE DENIED BECAUSE PETITIONER'S COMPLAINT THAT THE TRIAL COURT INCORRECTLY REFUSED TO ADMIT CERTAIN EVIDENCE DOES NOT RAISE A SUBSTANTIAL ISSUE FOR CERTIORARI REVIEW AND BECAUSE THE TRIAL COURT'S RULING WAS CORRECT.

Petitioner's final question for review involves her complaint that, in a hearing on the administrator ad litem's Motion to Sell Personal Property, the trial court improperly excluded the expert testimony of a stock analyst who would have testified that the 980 shares of Ford Motor Company stock was a viable investment and would produce income if left intact. In sustaining the administrator ad litem's objection to the expert testimony, the trial court stated that it presumed the witness would testify that the Ford stock was a viable asset and that if left intact it would produce income. Pet. App. A80. Given the stated presumption by the trial court, the petitioner was not harmed by its exclusion. Thereafter, the trial court found that there was substantial evidence that good cause existed under Mo. Rev. Stat. § 473.460 (1980) to order the stock sold. Pet. App. A81.

In her appeal, the petitioner suggests that the trial judge "took up the cudgel" for the administrator ad litem in rejecting the expert testimony and refusing to allow reasonable cross-examination on the issue of other available assets. Pet. App.

A105. The Missouri Court of Appeals dealt with this issue by recognizing that Mo. Rev. Stat. § 473.460 (1980) allows for the liquidation of personal property, under court order, for the purpose of paying expenses of administration, claims, and expenses associated with the management of the estate assets. Pet. App. A105.

Mo. Rev. Stat. § 473.460 (1980) requires that personal property be sold before real property when funds are needed for the administration of the estate. Resp. Brf. *supra* at 2. The trial court followed the statute in this regard and the petitioner's complaint regarding the court's refusal to hear the expert testimony had no impact on the outcome of the case.[3] The trial court had a duty to follow the statute and order the personal property sold. Its refusal to hear testimony it deemed irrelevant had no bearing on the outcome of the hearing.

In Missouri, a trial court has broad discretion to rule on questions regarding the admission of evidence. *D.L.H. v. H.T.H.*, 780 S.W. 2d 104, 106 (Mo. App. 1989). Reversal of the trial court's ruling will come only on a showing of abuse of discretion. *M__D__ v. C__D__*, 691 S.W. 2d 406, 408 (Mo. App. 1985). Likewise, this Court has routinely supported those same legal precepts, including the admission or exclusion of *expert testimony. Salem v. United States Lines Company*, 370 U.S. 31, 35-36 (1962). In order to preserve the issue of exclusion of evidence for appeal, the party offering the testimony must make a specific offer of proof. Failure to do so leaves nothing for this Court to review. *Central Pac. R. Co. v. People of State of California*, 162 U.S. 91, 118 (1896). The transcript of the hearing reveals that no offer of proof was made by the petitioner. Pet. App. A79-A81.

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3. The record does not reflect that the petitioner suggested that there existed any other personal property within the administrator's control which could be sold to pay expenses of administration.

The petitioner contends that the trial court's refusal to hear the testimony of her witness amounts to a violation of due process under the Fifth and Fourteenth Amendments to the United States Constitution. Such a claim is virtually beyond belief. For all of the reasons set forth in Respondent's first point regarding this Court's limitation of certiorari jurisdiction this Court should not consider this claim to rise to the level of a federal question or one so weighty that the United States Supreme Court should take it up.

The petitioner is not unlike the myriad of other disgruntled litigants who does not have every irrelevant witness heard or every far-reaching question answered. Ultimately, as with her other claims, the petitioner failed to preserve anything for this Court's review. She did not deem it worthy of inclusion in her Motion to Transfer to the Missouri Supreme Court. Pet. App. A116-122. This Court should give it no further consideration.

CONCLUSION

For the reasons set forth above, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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APPENDIX A — SECOND AMENDED PETITION FOR DISCOVERY OF ASSETS DATED JANUARY 5, 1994

IN THE CIRCUIT COURT OF JACKSON COUNTY, MISSOURI
PROBATE DIVISION
AT INDEPENDENCE

No. PR89-030836-01

Estate No. 30836

JANICE C. CAMPBELL
Post Office Box 13531
Tucson, Arizona 85732-3531

Petitioner

vs.

JOSEPH E. CAMPBELL
1509 50th Street North
Blue Springs, Missouri 64015

and

RICHARD F. CAMPBELL
18819 East 5th Street North
Independence, Missouri 64056

Respondents

In the Estate of
Joseph F. Campbell

Deceased

Appendix A

SECOND AMENDED PETITION FOR DISCOVERY OF ASSETS

COMES NOW Petitioner Janice C. Campbell by her attorney Albert W.L. Moore, Jr., and for her second amended petition for discovery of assets states and shows the Court as follows:

1. Petitioner is one of the heirs of the Decedent Joseph F. Campbell and a legatee under the terms of his will in the above estate, in which letters testamentary were issued on November 3, 1988.

2. Respondents are the co-personal representatives in the above estate in this Court and legatees under said will.

3. From a point in time not later than 1983 until his death on October 21, 1987, Decedent was of unsound mind and was incapable of contracting or of managing his affairs and lacked the mental capacity to give a gift or otherwise perform an act having legal effect.

4. From a point in time not later than 1983 until his death on October 21, 1987, Decedent was in feeble health, mentally weak and infirm, and was subject to, and susceptible to, being led by attention and was easily influenced.

5. During the period of time described in paragraph 4 above, Respondents completely dominated Decedent and ran his affairs.

6. From a point in time preceding the year 1983 until Decedent's death on October 21, 1987. Respondent enjoyed a confidential and fiduciary relationship with Decedent, by which

Appendix A

Respondents set out to and did induce Decedent to cooperate in one or more of the transactions set out below.

7. During one or more of the periods of time described in paragraphs 3, 4 and 6 above, Respondents caused certain property of Decedent and interests in the property of Decedent (more fully set out below) to be sold, or to be transferred without due consideration to one or both of the Respondents herein.

8. When Decedent's health deteriorated in 1983, Respondents caused joint bank accounts to be opened in the names of Decedent and one or both of Respondents.

9. During one or more of the periods of time described in paragraphs 3, 4 and 6 above, income, benefits and other receipts accruing to Decedent were deposited into the joint bank accounts described in paragraph 8 above and disbursed by one or both of the Respondents.

10. On or about August 11, 1986, funds of Decedent were used to purchase real estate described as Lot 8, Sandalwood, a subdivision in Blue Springs, Jackson County, Missouri, for Respondent Joseph E. Campbell.

11. During one or more of the periods of time described in paragraphs 3, 4 and 6 above, Respondents caused the sale of real estate owned by Decedent situated on the Lake of the Ozarks, Missouri, Cedar Point Lot No. 2, and thereby injured the Decedent's estate.

12. On or about March 18, 1986, Respondents sold 654 shares of Decedent's Ford Motor Company common stock and thereby injured the Decedent's estate.

Appendix A

13. During one or more of the periods of time described in paragraphs 3, 4, and 6 above, Respondents used Decedent's funds to purchase motor vehicles for individuals other than Decedent.

14. During one or more of the periods of time described in paragraphs 3, 4 and 6 above, Respondents took other monies and chattels from Decedent.

15. During one or more of the periods of time described in paragraphs 3, and 4 and 6 above, Respondents took property of Decedent for which they have made no accounting, the exact description of which is unknown to Petitioner.

16. After Decedent's death on October 21, 1987, Respondents took property of Decedent properly a part of Decedent's probate estate for which they have made no accounting, the exact description of which is unknown to Petitioner.

17. Respondents' actions in the premises were outrageous because of their evil motive or reckless indifference to the rights of others.

WHEREFORE, Petitioner prays that the Court discover the property belonging to Decedent, determine the title and right of possession thereto, determine the persons who have an interest in said property together with the nature and extent of such interest and direct the delivery or transfer of said property to an administrator de bonis non of the estate of Joseph F. Campbell, deceased, appointed by the Court and render judgment against Respondents and in favor of said administrator de bonis non for all losses, expenses and damages to the above-captioned estate, including punitive damages and interest as provided by law, and for such other relief as is just and proper.

Appendix A

s/ Albert W.L. Moore, Jr.
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(816) 254-6070

ATTORNEY FOR PETITIONER
JANICE C. CAMPBELL

AFFIDAVIT OF JANICE C. CAMPBELL

STATE OF ARIZONA)
) ss.
COUNTY OF PIMA)

Affiant Janice C. Campbell, having first been duly sworn, states that the foregoing is true to the best of her knowledge.

s/ Janice C. Campbell
Janice C. Campbell

Subscribed and sworn to before me this 5 day of Jan, 1994

s/ Ann M. Battcher
Notary Public

My Commission Expires:
My Commission expires [illegible]